IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/09/2003

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THE HON'BLE MR.JUSTICE R.BALASUBRAMANIAN

C.R.P.PD.NO.1172 OF 2002

1. Albert Theatre rep. by
it's Partner A.Chakaravarthy
No.30, Vanavil Street
Egmore, Chennai - 8

2.A.Chakaravarthy ..Petitioners

-Vs-

1.M/s.Srivari Enterprises
rep. by its partner
T.Badrinath, No.46, Vardha Muthaiappan St.
Chennai - 41

2.V.Ramkumar ..Respondents

Prayer: Civil revision petition against the order dated 29.06.2001 passed in I.A.No.7211/2001 in O.S.No.5983/2000 on the file of the City Civil Court (VII Assistant Judge), Chennai.

!For Petitioners : Mr.AR.L.Sundaresan

^For Respondent 1 : Mr.A.Venkatesan

:ORDER

Defendants 2 and 3 in O.S.No.5983/2000 on the file of the learned VII Assistant Judge, City Civil Court, Chennai are the revision petitioners and they are challenging the order passed by the learned trial Judge in I.A.No.7211/2001 refusing leave to defend the suit. This revision is filed under section 115 of the Code of Civil Procedure. Section 115 of the Code as it stands today, would disable this court from exercising the power of revision and interfere with the order under challenge, so long as the order to be passed in the revision will not bring a finality to the proceeding pending before the court below. (See 2003-6-S.C.C.Pg.659) . At the same time, amendment of section 115 of the Code will not take away the power available to the court under Articles 226 and 227 of the Constitution of India and in exercise of such powers, the orders of the courts below can be corrected, is also a recognised position in law (See 2003-6-S.C.C.Pg.675).

2. Going by the order in challenge, I have no doubt at all in my mind that this court cannot exercise the power under section 115 of the Code. But however, going by the latter judgment of the Hon'ble Supreme Court of India referred to above, I have no doubt at all that if a case is made out to interfere with the judgment under challenge as laid down in that case, then this court would definitely step in and rectify the error. In the latter judgment, the Hon'ble Supreme Court of India had held as follows:
"The power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. The curtailment of revisional jurisdiction of the High Court under section 115 CPC by Amendment Act 46/1999 does not take away - and could not have taken away - the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court, nor is the power of superintendence conferred on the High Court under Article 227 of the Constitution taken away

or whittled down. The power exists, untrammelled by the amendment in section 115 CPC, and is available to be exercised subject to rules of self-discipline and practice which are well settled."

In the same judgment, the Hon'ble Supreme Court of India had also laid down in broad guidelines as to when the power available under Article 227 of the Constitution of India can be exercised:

"(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does not have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction."

"(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby. "

"(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court

may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis."

3. Coming to the facts of this case, it is seen that the suit is laid on a promissory note dated 06.08.1997. Admittedly the suit was filed only on 30.08.2000 (beyond the period of limitation). The plaintiffs rely upon the payment dated 13.04.1999 to save the suit from the law of limitation. Defendants 2 and 3 in the suit filed an affidavit accompanied by an application for leave to defend contending, among other things, that they have not made any payment at all as claimed in paragraph 4 of the plaint. A reading of paragraph 4 of the plaint shows that it is a cheque payment. Therefore it is clear that defendants 2 and 3 have come out with a positive stand that they have not made any such payment at all. The plaintiffs had met this objection in the following manner:

"Having repaid interest by account payee cheque upto 12.04.1999, the defendants are estopped from contending all such vexatious allegations."

Except stating the above, the plaintiffs have not disclosed anything in the affidavit as to who signed the cheque in question. Therefore it is clear to my mind that there is an area of dispute in the suit as to who made the payment as referred to in the plaint, which would constitute an acknowledgment of liability and thus save the suit from the law of limitation. Assuming that the payment by cheque was not made by defendants 2 and 3 but made by the other defendant only (this is only an assumption from the materials on record), the question that follows is, whether such acknowledgment given by a party to a suit would be binding on the non-acknowledging parties as well? This is therefore a triable issue. The judgment of the Hon'ble Supreme Court of India referred to above as to under what circumstances this court can exercise the powers under Articles 227 of the Constitution of India squarely gets attracted to the case on hand. The learned trial Judge had failed to take note of this ground raised by the defendants for leave to defend. If this error is not corrected at this moment, then it would be too late to correct the error, since everything will go in favour of the plaintiff. Accordingly the order under challenge is set aside and I.A.No.7211/2001 would stand allowed as prayed for. No costs. The defendants are directed to file their written statement on or before 13.10.2003 and the learned trial Judge is directed to dispose of the suit in any event not later than 30.11.2003.

vsl

To

The Registrar, City Civil Court, Chennai

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